U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-V-C-, INC.

DATE: OCT. 12, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software development services, seeks to permanently employ the Beneficiary as a software engineer I. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This category allows a U.S. employer to sponsor a professional with an advanced degree or its equivalent for lawful permanent resident status.

The Director, Nebraska Service Center, initially approved the petition on July 30, 2015, but revoked its approval on November 10, 2015. The Director concluded that the record at the time of the petition's approval did not establish the Beneficiary's possession of the experience required for the offered position. The Director also found that the record did not establish the Petitioner's intention to employ the Beneficiary.

The matter is now before us on appeal. We agree with the Petitioner that the record at the time of the petition's approval established its intention to employ the Beneficiary. However, the record did not establish the Beneficiary's possession of the experience required for the offered position. Therefore, upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. USCIS' Role in the Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Immigration and Citizenship Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act. Finally, a foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

By approving a labor certification application, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for an offered position. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certifies that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(II).

By granting a petition, USCIS determines that a beneficiary meets the requirements of the offered position certified by the DOL and that a petitioner and a beneficiary otherwise qualify for the requested immigrant classification. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a notice of intent to revoke where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

In these proceedings, we must decide whether the Director properly revoked the petition's approval.

B. The Petitioner's Intention to Employ the Beneficiary

A notice of intent to revoke must specify the underlying facts of proposed revocation. *Estime*, 19 I&N Dec. at 452. If a notice of intent to revoke is based on an unsupported statement or presumption, or if a petitioner did not receive notice of derogatory evidence, we cannot sustain the revocation of a petition's approval. *Id.*

In the instant case, the Director based the revocation in part on his conclusion that the record at the time of the revocation did not establish the Petitioner's intention to employ the Beneficiary. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F) (stating that a U.S. business may file an immigrant visa petition if it is "desiring and intending to employ" a foreign national). The Director found that clients or contracting companies, rather than the Petitioner, would control the Beneficiary's work in the offered position, which involves prolonged assignments at client sites.

The notice of intent to revoke (NOIR) of September 18, 2015, however, did not properly notify the Petitioner of this revocation ground. The NOIR notes the Director's prior request for evidence (RFE) of the Petitioner's intention to control the Beneficiary's work at client sites. But the NOIR concludes that the Petitioner established its intention to employ the Beneficiary. The NOIR states

that "the petitioner provided evidence of contracts with third party or end clients in which terms are specified that dictate you [the petitioner] exercise control over the employer's schedule, conduct, performance, and duties."

Despite the NOIR's finding, the revocation decision reaches the opposition conclusion. The decision states that "it appears the petitioner does not share a bona fide employer-employee relationship with its employees, and is primarily engaged with contracting personnel out to third party clients or to other contract staffing companies." Contrary to *Estime*, the NOIR did not specify the underlying facts of the proposed revocation ground and deprived the Petitioner of an opportunity to respond to the issue.

Moreover, as indicated in the NOIR, the record at the time of the notice's issuance established the Petitioner's intention to employ the Beneficiary. In response to the Director's RFE, the Petitioner submitted copies of contracts, time sheets, letters, and its performance appraisal of the Beneficiary. These materials indicate that the Petitioner controls the Beneficiary's work during his assignments at client sites.

For the foregoing reasons, the record at the time of the petition's revocation established the Petitioner's intention to employ the Beneficiary. We will therefore withdraw that portion of the Director's decision.

C. The Beneficiary's Qualifying Experience

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the petition. The petition's priority date is December 2, 2013, the date the DOL received the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in computer science or engineering or related.
. . .
H.6. Experience in the job offered: 6 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 6 months as a software engineer trainee or related.
H.14. Specific skills or other requirements: Employer will accept any suitable combination of education, experience or training consistent with H4 through H10 of this ETA 9089 Form.

Part H.11. of the labor certification sets forth the following job description for the proffered position: "Develop, Modify Web Based Applications using open source Java technologies (Java, JSPs, Servlets, WebServices, AJAX) for [redacted] systems. Gather Business Requirements, coordinate testing. Must have knowledge of Databases and SQL. This position will involve working in unanticipated locations."

The record establishes the Beneficiary's receipt in 2012 of a U.S. master's degree in a related field. The Beneficiary also attested on the labor certification to his possession of more than 12 months of qualifying experience as a software engineer trainee with the Petitioner from October 8, 2012, until the petition's priority date of December 2, 2013. The labor certification separates the Beneficiary's employment with the Petitioner as a software engineer trainee into two periods, one from October 8, 2012, to December 14, 2012, and one from December 17, 2012, onward. Although the job titles are the same for both periods, the job details differ.

A petitioner must support a beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(g)(1). The letter must provide the name, address, and title of the employer and a description of a beneficiary's experience. *Id.*

In the instant case, the Petitioner submitted letters from a senior director indicating its employment of the Beneficiary as software engineer trainee since October 2012.

The NOIR alleged that a letter from the Beneficiary's former employer was insufficient to establish the Beneficiary's possession of the experience required for the offered position. USCIS records, however, indicate that the NOIR confused the Beneficiary with another beneficiary of the Petitioner. The record at the time of the NOIR's issuance indicates that the Beneficiary did not claim to work for the former employer identified in the NOIR. Contrary to *Estime*, the NOIR misstated the facts underlying the proposed revocation and deprived the Petitioner of a meaningful opportunity to respond.

Despite the NOIR's defects, however, we can consider whether the Beneficiary possesses the experience required for the offered position. Unlike the NOIR, our notice of intent to dismiss and

request for evidence (NOID/RFE) of June 17, 2016, informed the Petitioner of insufficient evidence of the Beneficiary's claimed qualifying experience based on correct underlying facts. The Petitioner therefore received proper notice and an opportunity to respond to this revocation ground. *See Betancur v. Roark*, No. 10-11131-RWZ, 2012 WL 4862774, *9 (D. Mass. Oct. 15, 2012) (holding that we may issue a notice on appeal that "cures" a prior, defective notice of intent to revoke).

A labor certification employer cannot rely on experience gained with it by a foreign national, unless the experience was gained in a position "not substantially comparable" to the offered position or it is no longer feasible to train a worker for the job opportunity. 20 C.F.R. § 656.17(i)(3). A "substantially comparable" position means a position requiring the same job duties as the offered position more than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

The instant Petitioner asserts that the Beneficiary gained qualifying experience with it in a position not substantially comparable to the offered position. The record contains letters from the Petitioner's senior director stating that the duties of the offered position are substantially different than the Beneficiary's duties as a software engineer trainee.

The letters state that the offered position of software engineer I involves gathering business requirements, modifying, or coordinating testing of web-based applications for enterprise systems. As a software engineer trainee, the letters state that the Beneficiary assisted in developing such applications. The letters assert that as a software engineer trainee, "the Beneficiary played no role in gathering business requirements, modification, or testing coordination of such web-based applications."

As indicated in our NOID/RFE and contrary to the Petitioner's letters, however, the Beneficiary attested on the labor certification that, as a software engineer trainee from October 8, 2012, to December 14, 2012, he "[w]orked closely with business users and [was] involved in requirements gathering."[1] Further, the Beneficiary attested that, as a software engineer trainee from December 17, 2012, onward, he "[u]sed framework for testing. Used for logging purposes. Involved in defect tracking and bug fixing. Involved in performance tuning the application using tools like Therefore, the labor certification contradicts the Petitioner's assertion that the Beneficiary played no role in gathering business requirements, modifying, or testing web-based applications as a software engineer trainee.

Thus, the labor certification contradicts the Petitioner's assertions that the Beneficiary did not gather business requirements, modify, or test web-based applications as a software engineer trainee. This discrepancy cast doubt on the veracity of the Petitioner's letters and whether the Beneficiary's position as a software engineer trainee substantially differs from the offered position. Our NOID/RFE stated that the Petitioner must resolve the inconsistencies and discrepancies with

[1] The Petitioner has not indicated in its letters, and the record does not establish, that the Beneficiary's duties as a software engineer trainee were different during the period from October 8, 2012, to December 14, 2012, and from December 17, 2012, onward, as set forth on the labor certification.

independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In its response to the NOID/RFE, the Petitioner repeated its assertion that the offered position of software engineer I was not substantially comparable to the position of software engineer trainee, but did not provide independent, objective evidence to resolve the inconsistencies in the record.

A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Because of the unresolved inconsistencies, the record at the time of the petition's approval did not establish the Beneficiary's possession of the experience required for the offered position. We will therefore affirm the Director's decision and dismiss the appeal.

II. CONCLUSION

The record at the time of the petition's approval established the Petitioner's intention to employ the Beneficiary. We will therefore withdraw the Director's contrary conclusion. But the record did not demonstrate the Beneficiary's possession of the experience required for the offered position. We will therefore dismiss the appeal.

As in visa petition proceedings, a petitioner in visa revocation proceedings bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act; *Ho*, 19 I&N Dec. at 589. Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of I-V-C-, Inc.*, ID# 81736 (AAO Oct. 12, 2016)